No. 82-1428

In the Supreme Court of the United States

OCTOBER TERM, 1982

DAIRYMEN, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether an agricultural cooperative's claim of exemption from Federal Trade Commission proceedings challenging its acquisition of a processor is subject to interlocutory judicial review in the district court prior to final agency action.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Statutes and regulations:

Page

Statutes and regulations—Continued:

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 684 F.2d 376. The opinions of the district court (Pet. App. 10a-14a, 16a, 19a-21a) are not reported. The rulings of the administrative law judge denying petitioner's motions to dismiss a Federal Trade Commission administrative complaint and to suspend or stay discovery (C.A. App. 219-226)[1] are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 7a) was entered on July 30, 1982. A petition for rehearing was denied on September 30, 1982 (Pet. App. 9a). On December 16, 1982, Justice O'Connor extended the time to petition for

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[1]"C.A. App." refers to the joint appendix in the court of appeals.

a writ of certiorari to February 27, 1983. The petition was filed on February 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent portions of Sections 6-7 of the Clayton Act, 15 U.S.C. (& Supp. V) 17-18, Section 20(a) of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. V) 57c note, the Capper-Volstead Act, 7 U.S.C. 291-292, and Section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704, are set forth at Pet. 2-7.

STATEMENT

On July 31, 1980, the Federal Trade Commission issued an administrative complaint charging that petitioner had violated Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. V) 45, by its acquisition in September 1978 of Farmbest Foods, Inc. (C.A. App. 19). Petitioner is an agricultural cooperative engaged in the production, processing, and distribution of milk and dairy products. Farmbest, before its acquisition, was a privately owned processor of dairy products.

The complaint alleged that petitioner is "a corporation subject to the jurisdiction of the Commission" (C.A. App. 20) and that the effect of the acquisition "may be substantially to lessen competition or to tend to create a monopoly in the processing and sale of fluid milk" (*id.* at 27). If, after hearings on the complaint, the Commission orders divestiture, petitioner may petition the appropriate court of appeals for judicial review. 15 U.S.C. 21(c), 45(c). The Commission's order is stayed by operation of law until judicial review is completed. 15 U.S.C. 21(g), 45(g).

The case was referred to an administrative law judge. Petitioner moved to dismiss the complaint, asserting that

under Section 6 of the Clayton Act (15 U.S.C. 17), the Capper-Volstead Act (7 U.S.C. 291-292), and Section 20(a) of the Federal Trade Commission Improvements Act of 1980 (Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. V) 57c note), the Commission was barred from challenging the Farmbest acquisition. Petitioner asserted that the Commission may challenge an acquisition by an agricultural cooperative only if its complaint alleges that the acquisition is predatory (C.A. App. 30-77). Petitioner also moved to stay discovery pending disposition of the motion to dismiss (*id.* at 127-132). The ALJ denied both motions, holding that petitioner's status as an agricultural cooperative did not in itself preclude the Commission's challenge to the acquisition. He reserved judgment on petitioner's claim that the complaint must allege predatory conduct (*id.* at 219-226).[2]

Petitioner requested the ALJ to certify the exemption issue to the Commission for interlocutory review.[3] That same day petitioner filed suit in the Western District of Kentucky, seeking an injunction prohibiting further discovery proceedings until the FTC ruled on its motion to dismiss (Pet. App. 11a). The district court, relying on *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), held that petitioner had not shown that it would suffer irreparable injury. The court also noted that judicial review of petitioner's underlying exemption claim—should the FTC rule adversely on the motion for interlocutory review—would be precluded at this stage of the administrative proceedings by the failure to exhaust administrative remedies and the absence of "final agency action" (Pet. App. 13a). See 5 U.S.C. 704.

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[2]By order of July 22, 1982, the ALJ rejected petitioner's claim that predation must be alleged.

[3]Under Section 3.23 of the Commission's Rule of Practice and Procedure, 16 C.F.R. 3.23, and Section 8 of the Administrative Procedure Act, 5 U.S.C. 557, the Commission ordinarily does not consider matters in adjudication before an ALJ except on appeal from the ALJ's Initial Decision.

The ALJ subsequently denied petitioner's motion to certify the exemption issue to the Commission (C.A. App. 319). Petitioner then filed a second action ("*Dairymen II* ") in the Western District of Kentucky to enjoin the proceedings before the Commission, asserting that its acquisition of Farmbest was immune from antitrust scrutiny by the FTC. The district court dismissed the complaint on grounds of collateral estoppel (Pet. App. 20a-21a). The court added, as an alternative ground, that it lacked jurisdiction because the Commission had taken no "final agency action" (*id.* at 21a).

3. On petitioner's appeals,[4] the Sixth Circuit affirmed both rulings. It held that the Administrative Procedure Act's requirement of final agency action "forbids judicial consideration of Dairymen's claim of exemption * * * until completion of the FTC proceedings" (Pet. App. 2a). The court stated that the exception to the finality requirement enunciated in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), was limited to "jurisdictional defects which are apparent on the face of the record, * * * and in plain contravention of a statutory mandate" (Pet. App. 5a). *Leedom* was inapplicable, the court explained, because the FTC's alleged lack of jurisdiction was not apparent on the face of the record (*ibid.*).

ARGUMENT

The petition in this case presents nothing more than the kind of demand for premature judicial review of agency proceedings this Court has uniformly rejected. The decision of the court of appeals is correct, and is consistent with prior

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[4]Despite its concession in *Dairymen II* that "[o]n the face of the FTC Improvements Act of 1980, the Commission has the authority to prosecute a Capper-Volstead cooperative" (C.A. App. 333), on appeal petitioner asserted for the first time (Brief for Appellant 16-21) that the Commission has no authority whatsoever over agricultural cooperatives.

decisions of this Court. Petitioner cites no conflict with a decision of any other court, and offers no other reason for plenary consideration.

1. This case concerns the timing of judicial review of petitioner's claim that its acquisition of Farmbest is exempted from antitrust proceedings by the FTC under the Capper-Volstead Act, 7 U.S.C. 291-292. The Capper-Volstead Act exempts from the antitrust laws combinations of persons "engaged in the production of agricultural products as farmers * * * [and] dairymen * * * in collectively processing, preparing for market, handling and marketing * * * such products of persons so engaged" (7 U.S.C. 291). Petitioner concedes (Pet. 8) that the subject of the challenged acquisition, Farmbest, is a processor, not a producer of agricultural products. Farmbest therefore could not become a member of Dairymen, Inc. *Case-Swayne Co., Inc.* v. *Sunkist Growers, Inc.*, 389 U.S. 384 (1967). This Court has ruled that only activities legitimately related to bona fide collaborative processing and marketing efforts by genuine producers fall within the exemption. See, *e.g.*, *United States* v. *Borden Co.*, 308 U.S. 188, 204-205 (1939) (agreement with distributors and others not exempt from Sherman Act); *Maryland & Virginia Milk Producers Ass'n* v. *United States*, 362 U.S. 458, 462-467, 468-469 (1960) (acquisition of milk dealer not exempt from Section 7 of the Clayton Act).[5] See also *United States* v. *Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981) (proof of predatory conduct not necessary to overcome Capper-Volstead exemption). Moreover, the right to an exemption is not automatic;

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[5]A leading commentator has read this Court's decisions in *Maryland & Virginia Milk Producers Ass'n*, *supra*, 362 U.S. at 464-466, and in *Borden Co.*, *supra*, 308 U.S. at 203-205, to hold that the exemption does not apply to combinations of Capper-Volstead associations with non-exempt organizations, whether by merger or by agreement. P. Areeda, *Antitrust Analysis* 109 (3d ed. 1981).

the burden of proving entitlement rests upon the party claiming it. *United States* v. *First City National Bank*, 386 U.S. 361, 366 (1967); *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948).

2. The decision of the court of appeals postponing review of petitioner's claim to a Capper-Volstead exemption until final agency action accords fully with the guidelines established in the Administrative Procedure Act ("APA"), for review of agency action (5 U.S.C. 701 *et seq.*), as recently reiterated in *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980) ("*Socal* "). The Commission's averment of jurisdiction over the transaction and petitioner's denial put in issue matters of law, and possibly of fact, to be explored by the Commission in the first instance on the adjudicatory record. After the Commission makes its final determination judicial review of all adverse determinations is provided. Such review does not lie in the district courts, however, but in the courts of appeals in accordance with the statutory scheme established by Congress for review of FTC orders under the Clayton and Federal Trade Commission Acts. 15 U.S.C. 21(c) and 45(c). See *Socal, supra*, 449 U.S. at 245.

In the present posture of the administrative proceeding from which petitioner claims exemption, the ALJ has denied petitioner's claim (C.A. App. 219-226) and declined to certify the issue to the Commission for interlocutory review (C.A. App. 319). Thus the claim of exemption must await review and final disposition by the Commission of the ALJ's Initial Decision, in accordance with 5 U.S.C. 557(b) and the Commission's rules, 16 C.F.R. 3.51-3.54,[6] before it constitutes final agency action ripe for judicial review in the courts of appeals. This procedure is precisely what *Socal* contemplated.

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[6]Under the rules, any party may appeal from adverse rulings. 16 C.F.R. 3.52. Alternatively, the Commission may review the initial decision sua sponte. 16 C.F.R. 3.53.

In *Socal* a firm charged with violations of the Federal Trade Commission Act sought district court review of the lawfulness of an FTC administrative proceeding against it while the administrative adjudication was pending before an ALJ. Socal claimed that the Commission had violated the Federal Trade Commission Act by issuing its complaint without having "reason to believe" that Socal was violating the Act. This Court held that the Commission's decision to initiate an administrative adjudicative proceeding, by a complaint averring "reason to believe" that certain firms were engaged in unfair methods of competition, was not "final agency action" subject to judicial review under Section 10(c) of the APA (5 U.S.C. 704). 449 U.S. at 238-245.

The principles of *Socal* apply a fortiori to contested claims of exemption from administrative inquiry that require initial disposition of issues of law and fact. Petitioner can point to no irreparable injury entitling it to extraordinary intervention by the district court. In the present posture of the administrative proceedings it is not required to do or refrain from doing anything. Its possession of Farmbest continues undisturbed. It must, of course, respond to the administrative complaint. But the burden incurred in defending the acquisition against the Commission's allegations is not irreparable harm justifying a district court injunction. *Socal, supra,* 449 U.S. at 244.[7]

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[7] *Socal* also demonstrates why *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), does not support petitioner's claim. *Abbott Laboratories* involved effective regulations, not a nonfinal adjudicatory proceeding. The regulations were " 'definitive' " statements of the agency's position; they had a " 'direct and immediate * * * effect on the day-to-day business' " of the parties; they had the " 'status of law' "; and " 'immediate compliance with their terms was expected.' " *Socal, supra,* 449 U.S. at 239-240, quoting *Abbott Laboratories, supra,* 387 U.S. at 151-152.

In *Sunkist Growers, Inc.* v. *FTC,* 464 F. Supp. 302 (C.D. Cal. 1979), appeal dismissed, No. 79-3091 (9th Cir. Sept. 14, 1981), a district court

3. Petitioner claims, nevertheless, that Section 20(a) of the Federal Trade Commission Improvements Act of 1980 (Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. V) 57c note) was intended to free it from any inquiry by the Commission into its claim of exemption. On its face, however, Section 20(a) is simply a reaffirmation of the Capper-Volstead exemption, expressed as a restriction on the use of appropriated funds by the FTC. It provides only that the Commission may not use funds to conduct "any study, investigation, or prosecution of any agricultural cooperative for any conduct which, because of [the Capper-Volstead Act], is not a violation of any Federal antitrust act or the Federal Trade Commission Act * * *." Although the question of Commission authority relating to agricultural cooperatives was vigorously debated, the terms in which the 96th Congress expressed its will in Section 20(a) preserved the Commission's jurisdiction over anticompetitive transactions not otherwise exempted by the Capper-Volstead Act. The Conference Report on the Federal Trade Commission Improvements Act of 1980 explains (H.R. Rep. No. 96-917, 96th Cong., 2d Sess. 37 (1980) (emphasis added)):

> This section has been added to ratify the spirit and intent of the Capper-Volstead Act (7 U.S.C. 291-292). The Conferees believe that the rationale for the *limited* antitrust exemption contained in the statute is valid.

Individual members of Congress likewise recognized that under Section 20(a) the Commission retained its existing jurisdiction over agricultural cooperatives.[8]

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held that a claim to exemption from FTC proceedings by a growers' association was ripe for immediate review, but that the transactions involved, including a challenged acquisition, were subject to Commission jurisdiction. The court's holding on the timing of judicial review was subsequently overruled by *Socal*.

[8]See 126 Cong. Rec. H3859-H3860 (daily ed. May 20, 1980) (remarks of Rep. Broyhill); *id.* at H3870 (remarks of Rep. Goldwater); 126 Cong. Rec. S5682 (daily ed. May 21, 1980) (remarks of Sen. Danforth).

In sum, nothing in the plain language or the legislative history of Section 20(a) indicates that Congress intended to abandon the principles of finality and orderly judicial review expressed in *Socal*, and to transfer from the Commission to the district courts for immediate resolution the question of Capper-Volstead exemption from the Commission's jurisdiction.

Since Section 20(a) was not intended to bar the Commission from determining whether the Capper-Volstead exemption applies, there is no merit to petitioner's claim that merely subjecting it to a proceeding in which this question will be resolved violates its rights. Therefore, its claims that immediate district court review is necessary to prevent loss of its Section 20(a) rights are without foundation. The Capper-Volstead issue must await final resolution by the Commission and review of any adverse order in the court of appeals. At the present stage of the case, the ALJ's ruling on the merits of the Capper-Volstead issue is preliminary and interlocutory. As the Court explained, in rejecting a similar contention in *Socal, supra*, 449 U.S. at 245, the APA expressly provides that a " 'preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action,' 5 U.S.C. § 704 * * * ." The APA also provides that the "reviewing court shall * * * hold unlawful and set aside agency action * * * in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" (5

In support of its claim that Congress specifically intended to protect cooperatives from expenses they might incur in defending themselves in FTC proceedings, petitioner erroneously relies (Pet. 12-15) on various excerpts from debates in the House on Representative Andrews' proposed amendment to H.R. 2313, 96 Cong., 1st Sess. (1979), which would have barred *all* Commission antitrust activities against agricultural cooperatives. However, Representative Andrews' amendment was rejected in conference. See H.R. Rep. No. 96-917, *supra*, at 21-22, 36-37.

U.S.C. 706(2)(C)). Moreover, Congress has expressly invested the courts of appeals with exclusive jurisdiction over the "form of proceeding for judicial review" of final Commission orders —petitions for review. 15 U.S.C. 21(c), 45(c).[9]

Such proceedings are plainly adequate to dispose of petitioner's claim that its acquisition of Farmbest is exempt from scrutiny by the Commission. As *Socal* noted (449 U.S. at 242), interlocutory judicial review of such claims by a district court would disrupt ongoing agency processes, deprive the judiciary of the benefit of agency expertise, lead to piecemeal review, and delay resolution of the ultimate question whether the law had been violated.[10]

4. Petitioner is mistaken in relying on *Leedom* v. *Kyne*, 358 U.S. 184 (1958), to support its claim (Pet. 18-19) that this case is distinguishable from *Socal*. In *Leedom*, the NLRB had violated a specific and unambiguous legislative prohibition against combining professional and nonprofessional employees in the same bargaining unit without approval by a majority vote of the professional employees (358 U.S. at 188). The unlawful nature of the Board's action was conceded by the agency (*id.* at 187). Moreover, without immediate access to judicial review by the professional employees the right Congress had expressly conferred on them would have been obliterated, for there was no other means, within their control, by which they could protect their statutory right to bargain collectively as a separate

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[9]Section 10(b) of the Administrative Procedure Act, 5 U.S.C. 703, provides that except in the absence or inadequacy thereof, "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute * * *."

[10]Congress provided in 5 U.S.C. (Supp. V) 559 that no subsequent statute may be held to supersede or modify the Administrative Procedure Act and its provisions for judicial review "except to the extent that it does so expressly."

unit (*id* at 190). The issue in *Leedom* was thus whether judicial review should be entirely precluded. In contrast, the issue here "is just the timing and adequacy of judicial review by the prescribed method * * *." *General Finance Corp.* v. *FTC*, 700 F.2d 366, 370 (7th Cir. 1983). As we have shown above, review in the court of appeals following final Commission action is both timely and adequate under the scheme of the Federal Trade Commission and Clayton Acts.

5. Neither *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), nor *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1848), supports petitioner's claim (Pet. 17-18) that the Capper-Volstead issue is appropriate for review at this preliminary stage of the administrative proceedings. Here, in contrast to *Cohen*, the exemption issue would be merged into any adverse final order, and would be open to review by any appropriate court of appeals under 15 U.S.C. 21(c) and 45(c). See *Socal, supra*, 449 U.S. at 245-246. And unlike *Forgay*, where the lower court had ordered the disputed property sold and the proceeds distributed among creditors of the bankrupt, the Commission's assertion of authority has no immediate practical or legal effect on petitioner beyond its participation in the proceedings.[11] See *Socal, supra*, 449 U.S. at 239-242.

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[11]By order dated Nov. 4, 1982, the Commission withdrew the administrative proceeding from adjudication to permit its consideration of a proposed settlement. If the proposed settlement is rejected by the Commission, the case will be returned to adjudication for further proceedings. If accepted, it will be placed on the public record for a 60-day public comment period. Thereafter, the Commission may either withdraw its acceptance, or issue and serve the agreed final decision and order. 16 C.F.R. 3.25(f). Petitioner asserts (Pet. 11 n.4) that if the settlement is accepted, it will move to vacate the judgment of the court of appeals.

The approach this Court has followed in cases which have become moot subsequent to the judgment of the court of appeals has been to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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deny the petition if the issues presented do not independently merit review. *Velsicol Chemical Corp.*, v. *United States*, 435 U.S. 942 (1978); cf. *Ringsby Truck Lines, Inc.* v. *Western Conf. of Teamsters*, 686 F.2d 720 (9th Cir. 1982) (judgment below should not be automatically vacated if appeal was mooted by appellant's voluntary action in settling a case). We perceive no legal consequences adverse to petitioner that could attach to the judgment of the district court if certiorari is denied. That judgment simply denied interlocutory review without passing on the merits either of the Capper-Volstead or the antitrust issue.

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